Dr Wan Himratul Azna bt Wan Harun v Dato' Dr Rohan Malek Johan & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(W)-390–12 OF 2015
UMI KALTHUM, VARGHESE GEORGE AND PRASAD ABRAHAM JJCA
12 JANUARY 2017

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Civil Procedure — Appeal — Interference by appellate court — Whether trial judge failed to sufficiently appreciate evidence led in court — Whether trial judge misdirected herself on facts and law — Whether trial judge's approach to testimonies of expert witnesses correct

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Tort — Negligence — Professional negligence — Medical practitioners — Claim against — Standard of care and skill required — Whether trial judge applied low standard of care in respect of professional care required — Whether plaintiff received reasonable medical care and attention from third defendant on her reported gynecological symptoms — Whether plaintiff received reasonable medical care and attention from first defendant for ureteric stricture — Claim against hospitals — Whether hospitals vicariously liable for acts and omissions of first and third defendants — Whether hospitals directly liable for their organisational system failures that had resulted in pain and suffering, losses and expenses incurred by plaintiff — Whether defendants liable for delay in full diagnosis of plaintiff

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The plaintiff was a senior pathologist in Serdang Hospital. On 26 April 2007, she had sought treatment at Serdang Hospital's Emergency Department with a complaint of painful menses. She was attended to by Dr Jamali Wagiman ('DW2') who had diagnosed her condition to be possibly related to endometriosis and fixed an appointment for diagnostic laparoscopy to be done on the plaintiff. However, the plaintiff failed to keep the appointment and on 5 July 2008, again sought treatment at Serdang Hospital's Emergency Department for the same complaint. A diagnostic laparoscopy was again suggested but the plaintiff opted to be treated with stronger pain management medication. Subsequently in July 2008, the plaintiff complained of pain in her left loin and was seen at the nephrology clinic of Serdang Hospital. An arrangement was thereafter made for the plaintiff to see the first defendant at Selayang Hospital in respect of a possible left ureteric obstruction. Instead of consulting the first defendant, the plaintiff went to see a private urologist at the Selangor Medical Centre, where a stenting procedure was carried out on the plaintiff. When there was recurrence of the left loin pain, the plaintiff visited

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the first defendant, who carried out a Holmium laser and stenting procedure on the plaintiff on 10 September 2008. She carried on being treated by the first defendant in 2010 when there was a recurrence of the same condition, when a repeat procedure was performed. The plaintiff had also been attended to by the third defendant at Serdang Hospital on a complaint of chronic pelvic pain and itchy vaginal discharge and put on conservative pain management medication. The plaintiff continued to seek treatment from the third defendant until 21 October 2009. In respect of her gynecological problem the plaintiff decided to consult a private consultant who discovered an ovarian cyst. The plaintiff had thereafter approached the first defendant to suggest that a joint surgery by the first defendant urologist and the private consultant gynecologist be carried out on the plaintiff at the private specialist hospital. The first defendant had refused to accede to this proposal because it would amount to a contravention of government regulations. The plaintiff thereafter sought treatment from two other specialists who had on August 2011 performed a joint surgery, which had resulted in the plaintiff no longer suffering the recurrence of the initial left loin pain or mid-cycle menses pain. The plaintiff filed an action against the first and third defendants as the doctors from Selayang Hospital and Serdang Hospital respectively for medical negligence and the second defendant as the employer of the first and third respondents. It was the plaintiff's case that the first and third defendants had not exercised due care and diligence that was professionally owed to the plaintiff. Apart from the claim that the second defendant was vicariously liable for the acts and omissions of the first and third defendants, the plaintiff also averred that the second defendant was 'directly liable' as the operator of the two government owned hospitals for their organisational system failures that had resulted in the pain and suffering, losses and expenses as incurred by the plaintiff. The trial judge dealt extensively with the various issues of fact and questions of mixed fact and law that arose in the suit before dismissing the plaintiff's action with costs. Hence the present appeal wherein the plaintiff submitted that the trial judge had failed to sufficiently appreciate the evidence led in court, applied a low standard of care in respect of the professional care required of the defendants and had misdirected herself on the facts and the law in concluding to dismiss the plaintiff's suit.

Held, dismissing the appeal with costs of RM20,000:

(1) The trial judge had not committed any error in the appreciation of the test to be applied with respect to the standard of care and skill required of a medical practitioner in the treatment of a patient. It was to be a fair and reasonable standard commensurate with the skill expected to be exercised and not a very high standard. In relation to the treatment accorded to the plaintiff at Serdang Hospital by DW2 and the third defendant, it was the plaintiff's choice not to undergo the diagnostic laparoscopy suggested. Based on the facts there were also long lapses of time between the gynecological treatments sought by the plaintiff and received at Serdang

Hospital and there was nothing acutely amiss with the medical attention she had received either from DW2 or the third defendant at Serdang Hospital. As such, the trial judge was correct in finding that there had been no negligence on the part of the third defendant and neither was it reasonable for the third defendant or Serdang Hospital to be apportioned with lability for the subsequent surgery that the plaintiff had to undergo in August 2011 (see paras 40 & 42–45).

(2) With respect to the impugned treatment received by the plaintiff from the first defendant at Selayang Hospital, it should be highlighted that when the first defendant was treating her for ureteric obstruction, the plaintiff had not informed him that the pain she suffered was associated with her menstrual cycle. Further, there was agreement among the expert witnesses that previous gynaecological surgeries that the plaintiff had undergone could be the cause of the ureteric strictures. There was therefore no misdiagnosis or wrong treatment administered by the first defendant. In any event, there were long periods in between when the plaintiff had relief from her complaint of left loin pain. As such, the trial judge was not wrong or unreasonable in her findings. The plaintiff had received reasonable medical care and attention at Serdang Hospital at the hands of the third defendant on her reported gynaecological symptoms and at Selayang Hospital at the hands of the first defendant for pain caused by ureteric stricture (see paras 46–47, 49–51 & 53).

(3) Any delay in a fuller diagnosis as claimed by the plaintiff was wholly attributable to the plaintiff's own failure to apprise the first defendant of the preliminary diagnosis reached in Serdang Hospital and not the lack of any communication between the specialists who had treated her at two different government hospitals, as alleged (see para 54).

(4) There was no indication that the trial judge had not critically considered the testimonies of the respective expert witnesses. As such, the trial judge's approach to the expert witnesses evidence was correct and could not be faulted in the circumstances (see paras 55–56).

[Bahasa Malaysia summary

Plaintif adalah ahli patologi kanan di Hospital Serdang. Pada 26 April 2007, dia mendapat rawatan di Bahagian Kecemasan Hospital Serdang kerana mengadu sakit haid. Dia telah dirawat oleh Dr Jamali Wagiman ('DW2') yang telah mendiagnos keadaannya sebagai berkemungkinan ada kaitan dengan endometriosis dan telah menetapkan temujanji untuk diagnostik laparoskopi dilakukan ke atas plaintif. Walau bagaimanapun, plaintif telah gagal menepati temujanji itu dan pada 5 Julai 2008, sekali mendapat rawatan di Bahagian Kecemasan Hospital Serdang kerana aduan sama. Satu diagnostik laparoskopi sekali lagi dicadangkan tetapi plaintif memilih untuk dirawat dengan ubat mengawal sakit yang lebih kuat. Berikutan itu pada Julai 2008, plaintif

A mengadu sakit di bahagian kiri pinggangnya dan dilihat di klinik nefrologi Hospital Serdang. Satu aturan telah dibuat selepas itu untuk plaintif berjumpa dengan defendan pertama di Hospital Selayang berkenaan kemungkinan bahagian kiri *uterus* tersumbat. Sebaliknya, plaintif tidak mendapat nasihat defendan pertama tetapi telah pergi berjumpa ahli urologi di Pusat Rawatan B Selangor, di mana prosedur *stenting* telah dijalankan ke atas plaintif. Apabila sakit bahagian kiri pinggang berlaku berulang kali, plaintif telah berjumpa defendan pertama, yang tleah melakukan laser Holmium dan prosedur *stenting* ke atas plaintif pada 10 September 2008. Dia terus dirawat oleh defendan pertama pada 2010 di mana berlaku lagi keadaan sama, apabila ulangan C prosedur dilakukan. Plaintif juga telah dirawat oleh defendan ketiga di Hospital Serdang kerana aduan sakit *pelvis* yang kronik dan cecair *vagina* yang gatal dan diberikan ubat untuk mengawal sakit secara konservatif. Plaintif berterusan mendapat rawatan daripada defendan ketiga sehingga 21 September 2009. Berhubung masalah sakit puannya plaintif membuat D keputusan mendapat nasihat konsultan peribadi yang menemui sista ovari. Plaintif telah kemudian berjumpa defendan pertama untuk mencadangkan agar pembedahan bersama oleh defendan pertama ahli urologi itu dan konsultan sakit puan peribadi itu dijalankan ke atas plaintif di hospital pakar swasta itu. Defendan pertama enggan bersetuju dengan cadangan ini kerana ia E akan merupakan perlanggaran peraturan kerajaan. Plaintif kemudian mendapat rawatan daripada dua pakar lain yang mana telah melakukan pembedahan bersama pada Ogos 2011, yang menyebabkan plaintif tidak lagi mengalami sakit bahagian kiri pinggan atau sakit kitaran pertengahan haid. Plaintif telah memfailkan tindakan terhadap defendan-defendan pertama dan F ketiga sebagai doktor-doktor daripada Hospital Selayang dan Hospital Serdang masing-masingnya kerana kecuaian perubatan dan defendan kedua sebagai majikan responden-responden pertama dan ketiga. Ia adalah kes plaintif bahawa defendan-defendan pertama dan ketiga tidak melaksanakan sikap berhati-hati dan ketekunan yang wajar yang patut diberikan secara profesional G kepada plaintif. Selain daripada dakwaan bahawa defendan kedua bertanggungjawab secara vikarius kerana tindakan dan peninggalan defendan-defendan pertama dan ketiga, plaintif juga menegaskan bahawa defendan kedua bertanggungjawab secara langsung sebagai operator dua hospital milik kerajaan untuk kegagalan sistem organisasi mereka yang telah H mengakibatkan kesakitan dan kesengsaraan, kerugian dan perbelanjaan sepertimana ditanggung oleh plaintif. Hakim perbicaraan mengendalikan secara teliti pelbagai isu fakta dan persoalan gabungan fakta dan undang-undang yang timbul dalam guaman tersebut sebelum menolak tindakan plaintif dengan kos. Justeru rayuan ini di mana plaintif berhujah I bahawa hakim perbicaraan telah gagal untuk memahami sewajarnya keterangan yang dkemukakan di mahkamah, mengguna pakai piawai berjaga-jaga yang rendah berhubung jagaan profesional yang dikehendaki oleh defendan-defendan dan telah salah arah diri beliau berhubung fakta dan undang-undang dalam membuat kesimpulan untuk menolak guaman plaintif.

Diputuskan, menolak rayuan dengan kos RM20,000:

(1) Hakim perbicaraan tidak melakukan apa-apa kekhilafan dalam memahami ujian yang terpakai berkaitan piawai berjaga-jaga dan kepakaran yang dikehendaki oleh pengamal perubatan dalam rawatan pesakit. Ia adalah piawai yang adil dan munasabah untuk setara dengan kepakaran yang dijangkakan untuk diamalkan dan bukan piawai yang terlalu tinggi. Berhubung rawatan yang diberikan kepada plaintif di Hospital Serdang oleh DW2 dan defendan ketiga, ia adalah pilihan plaintif untuk tidak menjalankan diagnostik laparoskopi yang dicadangkan. Berdasarkan fakta terdapat jurang masa yang panjang antara rawatan sakit pan yang didapati oleh plaintif dan diterima di Hospital Serdang dan tiada apa-apa penting yang terlepas pandang dengan layanan perubatan yang diterimanya sama ada daripada DW2 atau defendan ketiga di Hospital Serdang. Oleh itu, hakim perbicaraan adalah betul dalam mendapati bahawa tidak terdapat kecuaian di pihak defendan ketiga dan juga ia tidak munasabah untuk defendan ketiga atau Hospital Serdang dibahagikan tanggungjawab untuk pembedahan berikutnya yang mana telah dijalani oleh plaintif pada Ogos 2011 (lihat perenggan 40 & 42–45).

(2) Berhubung rawatan yang dipersoalkan yang diterima oleh plaintif daripada defendan pertama di Hospital Selayang, ia patut ditekankan bahawa apabila defendan pertama merawatnya untuk *uterus* tersumbat, plaintif tidak memberitahunya sakit yang dialaminya berkait dengan kitaran haidnya. Selanjutnya, terdapat perjanjian antara saksi pakar bahawa pembedahan sakit puan terdahulu yang dijalani oleh plaintif mungkin telah menyebabkan struktur *uterus* tersumbat. Oleh itu tiada diagnosis yang salah atau rawatan salah yang dibuat oleh defendan pertama. Dalam apa keadaan, terdapat tempoh masa yang lama antara masa plaintif mendapat relief daripada aduan sakit bahagian kiri pinggangnya. Oleh itu, hakim perbicaraan tidak terkhilaf atau tidak munasabah dalam penemuannya. Plaintif telah menerima jagaan dan layanan perubatan di Hospital Serdang dengan defendan ketiga berhubung simptom sakit puannya yang dilaporkan dan di Hospital Selayang dengan defendan pertama berhubung sakit yang disebabkan *uterus* tersumbat (lihat perenggan 46–47, 49–51 & 53).

(3) Apa-apa kelewatan dalam diagnosis yang menyeluruh sepertimana didakwa oleh plaintif adalah disebabkan oleh kegagalan plaintif sendiri untuk memberitahu defendan pertama tentang diagnosis awal yang dibuat di Hospital Serdang dan bukan kerana tiada komunikasi antara pakar-pakar yang telah merawatnya di dua hospital kerajaan yang berbeza sepertimana yang didakwa (lihat perenggan 54).

(4) Tiada tanda bahawa hakim perbicaraan tidak mempertimbangkan secara kritikal keterangan-keterangan saksi-saksi pakar berkenaan. Oleh itu,

pendekatan hakim perbicaraan terhadap keterangan saksi-saksi pakar adalah betul dan tidak boleh disalahkan dalam keadaan tersebut (lihat perenggan 55–56).]

Notes

For cases on interference by appellate court, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1420–1465.

For cases on professional negligence, see 12(1) *Mallal's Digest*, (5th Ed, 2015) paras 1641–1737.

Cases referred to

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle [1927] All ER Rep Ext 831; [1927] AC 37, HL (refd)

Powell v Streatham Manor Nursing Home [1935] All ER Rep 58; [1935] AC 243, HL (refd)

Appeal from: Suit No 21NCVC-197–08 of 2012 (High Court, Kuala Lumpur)

PS Ranjan (KB Karthi with him) (PS Ranjan & Co) for the appellant.

Ahmad Terrirudin bin Mohd Salleh (Habibah bt Haron and Mohammad Sallehuddin bin Md Ali with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Varghese George JCA:

INTRODUCTION

[1] The appellant before us was the plaintiff in a suit which essentially revolved around allegations of medical negligence. The initial parties sued were the first and second respondents but by an amendment to the writ and statement of claim, the third respondent was subsequently added as a further defendant in the action.

[2] The first and third respondents were doctors in the employ of the second respondent at the material time. Apart from the claim that the second respondent was vicariously liable for the alleged acts and omissions of the first and third respondents, it was further asserted by the plaintiff that the second respondent was purportedly also 'directly liable' as operators of two government owned hospitals, namely the Serdang and Selayang Hospitals, for

what was alleged to be 'organisational and system failures' which caused pain and suffering, losses and expenses occasioned to the plaintiff.

[3] The learned trial judge having heard eight witnesses for the plaintiff and a further six witnesses for the respondents, all except two of whom were medically qualified personnel, dismissed the plaintiff's action with costs. In a 49 page judgment the learned trial judge dealt extensively with the testimonies of the witnesses and the various issues of fact and/or questions of mixed fact and law that arose in the suit.

[4] We heard the appeal on 24 May 2016 and were not persuaded that the learned trial judge had failed to sufficiently appreciate the evidence led in court and/or had misdirected herself on the facts or in law or was plainly wrong in coming to her conclusion to dismiss the plaintiff's suit. Accordingly, we unanimously dismissed the appeal with costs.

[5] The parties will for convenience be referred to in this grounds of decision as they were at the High Court.

BACKGROUND

[6] The plaintiff was in 2007 a senior pathologist attached to the Serdang Hospital.

[7] The learned trial judge had painstakingly captured the chronological sequence of treatment or medical attention sought for and received by the plaintiff over a span of more than four years, namely, from 26 April 2007–3 August 2011, firstly at Serdang Hospital, and then at Selayang Hospital. It is not proposed to restate the same here. We only highlight below the significant sequential events thereto.

[8] The plaintiff first saw Dr Jamali Wagiman ('DW2') at Serdang Hospital's Emergency Department on 26 April 2007 with a complaint of painful menses, that is, dysmenorrhea. DW2's clinical diagnosis was that the condition was possibly related to endometriosis. DW2 fixed an appointment for diagnostic laparoscopy to be done on 11 May 2007 but the plaintiff failed to turn up on 10 May 2007 for preparations for the planned laparoscopy procedure.

[9] Some one year later on 5 July 2008 the plaintiff turned up again at the Emergency Department of Serdang Hospital with a similar complaint and was attended to by DW2. According to DW2, he once again suggested a diagnostic

laparoscopy for the suspected endometriosis but no appointment was scheduled as the plaintiff opted to be treated conservatively with stronger pain management medication.

[10] Subsequently in July 2008 itself, the plaintiff was seen at the nephrology clinic of Serdang Hospital for a check on her kidney arising from a complaint of having pain in her left loin. An appointment was to be arranged to see the first defendant ('DW5') at Selayang Hospital upon a diagnosis that the plaintiff might be suffering from left ureteric obstruction. However, rather than going to see the first defendant for consultation, the plaintiff on her own went to see a private urologist, one Dr Md Mahir bin Abdullah at the Selangor Medical Centre where a stenting procedure by insertion of a J stent was carried out to relieve a ureteric stricture that had been detected.

[11] Since there was a recurrence of the left loin pain, Dr Md Mahir referred the plaintiff to the first defendant and for the first time on 9 September 2008 the first defendant attended to the plaintiff.

[12] After consultation, the first defendant planned to carry out on 18 September 2008 a holmium laser ureterostomy and stenting procedure. However since the plaintiff was in severe pain, this procedure was carried out on 10 September 2008, the very next day. The plaintiff continued to be treated at Selayang Hospital and the stent was removed on 8 November 2008. There was admittedly some improvement in the plaintiff's condition thereafter.

[13] On 26 March 2009 the plaintiff was attended to for the first time by the third defendant ('DW5') back at Serdang Hospital on a complaint of chronic pelvic pain and 'itchy vaginal discharge'. An ultrasound examination was done and the plaintiff's condition was diagnosed as possible endometriosis and 'possible adenomyosis'. The plaintiff was put on conservative management for the pain. The third defendant was told that the plaintiff was being seen by the first defendant at Selayang.

[14] On 31 March 2009, some five days later, the plaintiff went for a follow-up consultation by the first defendant at Selayang Hospital. The plaintiff's version was that she had passed to the first defendant then a drawing of an 'endometriotic cyst' allegedly made (but denied) by the third defendant.

[15] The plaintiff did not seem to have any further complaints until 12 October 2009 (some seven months later) when the plaintiff went to see the third defendant again, this time with a complaint of acute pain at mid-cycle menses. Ultrasound examination of the plaintiff found no cyst. This was the last time the plaintiff was attended to by the third defendant.

[16] Some one year and nine months after the last appointment with the first defendant, the plaintiff saw the first defendant again on 21 December 2010 with a similar complaint of severe left loin pain. The first defendant made a clinical finding that there was a recurrence of the ureteric stricture and planned to repeat the holmium laser procedure and stenting. This was carried out on 27 December 2010. The plaintiff was then treated at Selayang Hospital for urinary tract infection ('UTI'). The stent was removed on 25 March 2011.

[17] On 20 May 2011, another urologist at Selayang Hospital, after studying the results of the various procedures (including ultrasound) and examinations that had been carried out, diagnosed that there was a possibility of the recurrence of the ureteric stricture earlier treated by the first defendant. An appointment was made for the plaintiff to see the first defendant on 24 May 2011 but this appointment was not kept by the plaintiff.

[18] On 23 July 2011 the plaintiff was admitted to Selayang Hospital for severe pain that she was suffering from and was treated for UTI. On 27 July 2011 when the first defendant attended to the plaintiff while on his ward rounds, the plaintiff for the first time told the first defendant that her left loin pain was associated with her menstrual cycle. The first defendant decided to refer the plaintiff to a consultant obstetrician and gynaecologist.

[19] Although there was some dispute whether it was at the suggestion of the first defendant or upon the choice of the plaintiff herself, the plaintiff was ultimately on 30 July 2011 seen by Dr Sivamohan ('PW3'), a private consultant at Damansara Specialist Hospital. PW3's finding was that a trans-vaginal ultrasound scan showed 'bilateral multilocuted ovarian cyst'.

[20] According to the plaintiff when she returned to see the first defendant she passed a message from PW3 that a joint surgery by a gynaecologist and an urologist be carried out on the plaintiff at the Damansara Specialist Hospital; this reportedly was not taken kindly by the first defendant who wanted to repeat for a third time the stenting procedure.

[21] According to the first defendant on the other hand, he could not agree to the proposal that a joint surgery be performed by him at a private hospital (as suggested) as it would amount to a contravention of government regulations; any surgery by him had to be done at the government hospital assisted by government specialists/doctors. According to the first defendant, the plaintiff thereupon pleaded that she be allowed to see one Dr Mohd Rushdan, a consultant gynaecologist, then attached to Hospital Sultanah Bahiyah, Alor Setar ('government hospital'), who apparently had treated her before.

[22] The first defendant agreed to the plaintiff's request and prepared a referral letter to Dr Mohd Rushdan. The first defendant went further to persuade the Selayang Hospital authorities to arrange for the plaintiff to be even flown to Alor Setar at the hospital's cost for that consultation (not by road by use of an ambulance as ordinarily done).

[23] While the plaintiff was still being warded at Selayang Hospital there appeared to have occurred on 3 August 2011 an incident where, according to the plaintiff, the first defendant had confronted the plaintiff in respect of a letter written by the plaintiff wherein she had complained to the director of Selayang Hospital about the rude behaviour of a sister nurse at the urology department without having first referred the matter or issue to the first defendant as the Head of the Urology Department.

[24] On 3 August 2011 itself the plaintiff sought to be discharged at her own request ('AOR') and after discharge, the plaintiff went to see Dr Abdul Aizz bin Yahya ('PW8') a consultant obstetrician and gynaecologist at Prince Court Medical Centre. PW8's clinical diagnosis was that the recurrent left ureteric stricture was due to endometriosis.

[25] After further consultation on 4 August 2011 with Dr Loh Chit Sin ('PW7'), a consultant urologist, a joint surgery was done on 9 August 2011 by PW8 and PW7 on the plaintiff, whereby a pelvic clearance by the TAHBSO ('Total Abdominal Hysterectomy and Bilateral Salpingoopherectomy') procedure and a reimplantation of the ureter were carried out. The plaintiff asserts that after this surgery she no longer suffer the recurrence of the ureteric stricture.

THE PLAINTIFF'S CASE AND APPEAL

[26] The basic assertions of the plaintiff at the trial were that:

(a) there were delays in the diagnosis and treatment of the plaintiff by DW2 and the third defendant at the Serdang Hospital with respect to her gynaecological condition;

(b) the third defendant had failed to communicate to the first defendant (at Selayang Hospital) the nature of the plaintiff's treatment at Serdang Hospital for her gynaecological condition and the suspicion that the plaintiff may be suffering from endometriosis; and

(c) the first defendant had not taken any proper or adequate history for the plaintiff and thereby failed to make the connection between the plaintiff's gynaecological condition and her urological problem (ureteric stricture) while being treated at Selayang Hospital.

[27] It was argued that the first and third defendants had not exercised due care and diligence that was professionally owed to the plaintiff and further that the second defendant did not have any proper system in place to prevent such 'fragmented' medical care and attention to which the plaintiff was subjected to.

[28] It was also argued that it was immaterial that the plaintiff was a medical specialist in this case, since the care, attention and processes expected from the defendants ought to be similar to that owed to any layman-patient. It was also submitted that in any case endometriosis could be treated without definitive laparoscopy diagnosis and further that DW2 and/or the third defendant had not explained to the plaintiff that given the plaintiff's prior multiple gynaecologically related surgeries, there was an increased risk involved in such laparoscopic diagnostic tests being carried out on her.

[29] The thrust of the appeal before us was in a similar tone. Essentially the contentions for the plaintiff were that:

(a) the learned trial judge failed to appreciate that there had been a 'system breakdown' and the failure to timely identify endometriosis as the cause of the ureteric strictures suffered by the plaintiff; this was the result of the fragmented and inadequate care firstly attributable to the first and third defendant, and secondly, a failure in record keeping or reporting as between the second defendant's facilities at Serdang and Selayang Hospitals;

(b) the learned trial judge had applied a rather low standard of care in respect of the professional care and diligence required of the first and third defendants and/or the government hospitals concerned; and

(c) the learned trial judge had disregarded admissions and concessions in the testimonies of the defence's own witnesses and expert, while such of their evidence in any event which were favourable to the defendants ought to have been treated with caution since these witnesses were from government hospitals and also colleagues of the first and third respondent.

OUR DELIBERATION AND DECISION

[30] In our assessment this appeal turned on the issue whether the learned trial judge had committed any 'appealable error' on the facts or in law or had been plainly wrong in the conclusion arrived at after the full trial. In this regard it must be pointed out that the sequence of treatment and generally the factual matrix as captured by the learned trial judge (paras 6–15 of the judgment) and restated by us at paras 6–25 of these grounds of decision, was not seriously disputed by the plaintiff.

[31] The nub of the plaintiff's complaint before us was more on the lines that the learned trial judge was wrong in drawing an effect adverse to the plaintiff from the totality of the evidence led before the court and/or that the court had applied a 'lower' test for the standard of care and diligence required of medically qualified persons, like the first and third defendants, in this case.

[32] In substance therefore what was being contended before us on appeal for the plaintiff here was that this court should re evaluate the whole of the evidence before the court, in effect grant the plaintiff a 'rehearing' of sorts. In this regard, it was apposite to recall the cliched as it may be, the essence of the respective roles of the trial court in contra distinction to an appellate court was captured in the phrase — the trial court was to ascertain the truth, while the appeal court was only to determine whether the trial judge had committed any errors in the process of coming to the conclusions made.

[33] We were particularly mindful too of the long acknowledged limits of appellate intervention as expounded by the Court of Appeal in *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 and approved by the Federal Court in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309.

[34] The Court of Appeal had stated at para 27:

> ... Suffice to say that we reaffirm the proposition that *an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence.* It is, we think, appropriate that we say what judicial appreciation or evidence involves.

And at para 28:

> *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him.* He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. ... He must also test the evidence of a particular witness against the probabilities of the case. (Emphasis added.)

[35] The Federal Court in endorsing the views of the Court of Appeal went on to note:

> In our view, the Court of Appeal in citing these cases had clearly borne in mind the *central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence*. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was

required to adjudicate upon a dispute must arrive at his decision on an issue of fact be assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. *The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal.* This in consistent with the established plainly wrong test. (Emphasis added.)

[36] In the same judgment, the Federal Court had quoted the speech of Lord Summer in the House of Lords decision in *Owners of Steamship Hontestroom v Owners of Steamship Sagaporack; Same v Owners of Steamship Durham Castle* [1927] All ER Rep Ext 831; [1927] AC 37 which was as follows:

What then is the real effect of the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute: *... None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.* The course of the trial and the whole substance of the judgment must be looked at, ... If his estimate of the man forms any substantial part of his reasons for his judgment, the trial judge's conclusions of fact should, as I understand the decisions, be let alone ... *We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.* (Emphasis added.)

[37] The Federal Court also referred to similar sentiments expressed by Viscount Sankey LC in *Powell v Streatham Manor Nursing Home* [1935] All ER Rep 58; [1935] AC 243 and we reproduce the same below:

What then should be the attitude of the Court of Appeal towards the judgment arrived at in the Court below under such circumstances as the present? *It is perfectly true that an appeal is by way of rehearing, but it must not be forgotten that the Court of Appeal does not rehear the witnesses. It only reads the evidence and rehears the counsel. Neither is it a re-seeing Court ...*

On an appeal against a judgment of a judge sitting alone, *the Court of Appeal will not set aside the judgment unless the appellant satisfies the Court that the judge was wrong and that his decision ought to have been the other way. Where there has been a conflict of evidence, the Court of Appeal will have special regard to the fact that the judge saw the witnesses ...* In my opinion, the duty of an appellate Court in those circumstances is for each Judge of it to put to himself, as I now do in this case, the question — Am I who sit here without those advantages sometimes broad and sometimes subtle, which are the privilege of the Judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the Judge who had them, was plainly wrong? *If I cannot be satisfied in my own mind that the judge with*

A *those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.* (Emphasis added.)

[38] In the instant appeal, upon a reading of the detailed judgment of the learned trial judge we were satisfied that the inferences drawn by the court from B the primary facts that were established at the trial were sustainable and reasonable on the criteria of probabilities. Further the learned trial judge who had the advantage and was tasked primarily with the assessment of the credibility of witnesses called, where there was a divergence of views, had indeed deliberated on the different versions and explained why one version was C preferred to the other. With respect to the evidence of expert witnesses adduced by the respective parties ('PW4' and 'PW7' for the plaintiff, and 'DW4' and 'DW6' for the defendants) it was also trite that the learned judge was not bound to any one particular opinion *but* had to be guided by what was D reasonably probable in all the circumstances of that case; this analysis of expert testimony had also been admirably done by the learned trial judge.

[39] Before we elaborate on our above observations further, the overarching question that had to be dealt with was whether the learned trial judge was E wrong in Her Ladyship's understanding or the application of the standards of the duty of care expected from a medical doctor, or even of a medical specialist. These were discussed and set out at paras 23–25 of the judgment and we reproduce the same in its entirety here:

> F [23] It is of course trite law that a doctor owes a duty of care to the patient he or she is treating and in exercising this duty of care, a doctor is expected to maintain a certain standard. The Bolam's test enunciated in the case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 was widely used as the accepted standard of care that should be exercised by a medical practitioner to his/her patient. The *Bolam*'s test is as follows:
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> > But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got his special skill. *The test is the standard of the ordinary skilled man exercising and professing to have the special skill.* A man need not possess the highest expert skill at the risk of H being found negligent. It is well established law *that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.*
> >
> > *(p 121 of the law report)*
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> Further down at pp 122, McNair J in that case made the following remark:
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> I
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> > A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.
>
> [24] The *Bolam*'s test in a nutshell says that if a doctor has acted in accordance with an accepted medical practice and that accepted medical practice is regarded as

proper by a responsible body of medical men in that particular art, then the doctor is not liable for negligence. For years the court in this country adopted and accepted the *Bolam*'s test in dealing with medical negligence cases until the Federal Court in *Foo Fia Na v Dr Soo Fook Man & Anor* [2007] 1 CLJ 229 decided to adopt the test laid down by the Australian case of *Rogers v Whitaker* [1992] 175 CLR 479. The Federal Court opined that the *Bolam*'s test is too restrictive as the test applied is connected to the accepted practice of 'responsible body of medical men skilled in that particular art'. *The Federal Court in Foo Fia Na's case then adopted the test laid down in Whitaker's case, in that, it is the court that should set the standard of care in medical negligence case based on the evidence and circumstances of the case.* In my opinion, decision in *Foo Fia Na*'s case does not entirely discarded or rejected the *Bolam*'s test to be replaced by the *Whitaker*'s test. *The test of reasonableness is still applicable. The only difference in so far as medical negligence case is involved, it is the court, and not 'a body of medical men', that now determines whether treatment, including the giving of advice and diagnosis, by the doctor is reasonable or not. The opinion of experts and of other doctors having the same specialised skill, however, shall provide a useful guide to the court in determining whether or not a defendant doctor faced with a negligence suit has exercised the reasonable standard of care.*

[25] *I think the court should also be mindful that doctors, especially specialists, may have different ways of carrying out treatment and management of a patient, and a doctor cannot be said to be negligent just because his or her method is different from another doctor.* I am also being reminded by what Raja Azlan Shah J (as he was then) said in *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171 at p 172:

> The principle of law is well established that a practitioner cannot be held negligent if he treats the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced.
>
> *The standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients.*

Further, *a doctor cannot be adjudged to be negligent simply because something went wrong unless it can be shown, on balance of probabilities, that he has fallen short of the standard of a reasonable skilful medical practice — see Payremaly a/l Veerappan v Dr Amarjeet Kaur & Ors* [2001] 3 MLJ 725. (Emphasis added.)

[40] We were of the view that the learned trial judge did not commit any error in the appreciation of the test to be applied with respect to the standard of care and skill required of a medical practitioner in the treatment of a patient; it was to be a fair and reasonable standard commensurate with the skill expected to be exercised and not a very high standard. It is pertinent to point out here that learned counsel for the plaintiff did not before us seek to attack or demolish the approach adopted by the learned trial judge as not being the applicable principle of law. The only argument mounted was that the learned trial judge had applied a 'low' test, ostensibly because, as raised in passing

before us, both the Serdang and Selayang Hospitals were '... tertiary and teaching hospitals with high standards expected of them'.

[41] We found no merits in learned counsel's contention. No authorities for any such distinction to be applied was cited and in any event it remained a simple and straightforward fact that the plaintiff sought treatment at those two hospitals similarly as would any other ordinary patient, albeit, while also being a specialist pathologist attached to the Serdang Hospital.

[42] In our assessment there were four critical areas that had to be focussed on in this appeal, namely:

(a) the treatment accorded to the plaintiff at Serdang Hospital by DW2 and the third defendant;

(b) the treatment of the plaintiff by the first defendant at Selayang Hospital;

(c) whether there was any obligation upon Serdang Hospital to communicate the plaintiff's medical history to Selayang Hospital or was it incumbent upon the plaintiff herself to apprise the first defendant of such needful medical background to assist in any diagnosis of her ailment; and

(d) the court's treatment of expert-witness evidence.

[43] With respect to the impugned treatment allegedly received by the plaintiff at the Serdang Hospital it must be highlighted that it was the plaintiff's own choice not to undergo the confirmatory diagnostic laparoscopy test suggested by DW2 on two occasions. The learned trial judge in analysing the evidence before the court stated as follows:

> [28] However, her ('the plaintiff') testimony must also be viewed with that of DW2 and the third defendant ('DW3'). At first PW1 testified in examination in chief that she neither agree nor refuse the laparoscopy because she was told by DW2 that DW2 wanted to discuss first with the third defendant about it. She also said that she refused the laparoscopy because Serdang Hospital at that time did not have a urologist. Then in cross-examination, PW1 said that the laparoscopy procedure was merely mentioned by DW2 in passing when she was treated for the first time by DW2 at the Serdang Hospital on 26 April 2007. The impression given by PW1 is that she was not explained in detail by DW2 regarding the risk of this procedure. On this issue of laparoscopy, I find it difficult to accept PW1's version. In fact she has not been consistent in her explanation. DW2 and the third defendant have testified that DW2 is himself an obstetrician and gynaecologist that can decide on laparoscopy without having to discuss with the third defendant. Further, the fact that DW2 has already fixed a date, that is 11 May 2007, for the laparoscopy procedure suggest that DW2 has already made the decision. She seemed to fault DW2 and the third defendant for not explaining the risk of laparoscopy. However, it is reasonable for DW2 and the third defendant, in my opinion, and based on the

fact that PW1 was also a medical person and a colleague, to expect PW1 to have a general idea about laparoscopy and its risk. In my opinion her testimony that she did not proceed with laparoscopy because DW2 has not explained to her the risk of the procedure, is merely an afterthought, thought off only after this suit was filed.

[44] The plaintiff had only been seen for the first time by the third defendant on 26 March 2009, some two years after being first seen by DW2 at Serdang Hospital (April 2007). The plaintiff was put on pain management medication as she was going to and did in fact see the first defendant for a follow-up urological consultation at Selayang Hospital on 31 March 2009; admittedly the plaintiff had told the third defendant of that forthcoming consultation with the first defendant. The third defendant next attended to the plaintiff only on 12 October 2009 when an ultrasound examination carried out detected no cysts. It is pertinent to point out that there was subsequently a lapse of more than a year before the plaintiff consulted the first defendant on 21 December 2010 for severe left loin pain; there seemed not to have been any complaint, either gynaecological or urological, from the plaintiff within that duration.

[45] What was obviously noticeable here was the fact that there were long lapses of time between the gynaecological treatments sought by the plaintiff and received at Serdang Hospital — April 2007–March 2009, March 2009–October 2010 that is, spanned over more than three years. The plaintiff's attendances at Serdang Hospital for treatment were random to say the least, all of which indicated that there was in any event nothing acutely amiss with the medical attention she had received either from DW2 or the third defendant at Serdang Hospital. The learned trial judge was in our view correct therefore in finding that there had been no negligence on the part of the third defendant and neither was it reasonable for the third defendant and/or Serdang Hospital to be apportioned with liability for the subsequent surgery that the plaintiff had to undergo in August 2011, apparently attributable to untreated endometeriosis.

[46] As regards the complaint of the plaintiff against the first defendant it must be particularly noted that though the nephrology clinic at Serdang Hospital had recommended the plaintiff to see the first defendant at Selayang Hospital, the plaintiff chose first to see Dr Md Mahir at the private Selangor Medical Centre in July 2008. A stent procedure was carried out to relieve the ureteric stricture at that private facility and upon a recurrence of the left loin pain, it was Dr Mahir who referred the plaintiff to see the first defendant, which consultation and treatment took place in September 2009.

[47] It must also be highlighted that although two stent procedures were carried out under the charge of the first defendant to relieve the ureteric stricture encountered by the plaintiff repeatedly, that is, on 10 September 2008

and 21 December 2010, it was only on 27 July 2011 when the plaintiff was admitted at Selayang Hospital with severe pain and was being treated for UTI that the plaintiff for the first time told the first defendant that the left loin pain she suffered from was associated with her menstrual cycle. She was then immediately referred to a private consultant obstetrician and gynaecologist ('PW3').

[48] Like the learned trial judge, we were also of the view that the first defendant was justified in the position taken that whatever surgery to be carried out jointly by the first defendant ('the urologist') and any gynaecologist had to be in a government hospital facility as the first defendant was bound to government regulations. It was notable that he first defendant thereafter even acceded to the request of the plaintiff to consult a government O&G specialist of her choice, Dr Mohd Rushdan at Alor Star Government Hospital and arrangements were put in place for the plaintiff to be flown there for that consultation.

[49] The learned trial judge dealt with the evidence before the court in respect of the treatment of the plaintiff by the first defendant in the following terms:

> [36] ... The evidence of the first defendant is that he wanted to send the plaintiff to see a gynaecologist in either Serdang or Selayang Hospital but the plaintiff chose to see PW3. The purpose of referring the plaintiff to a gynaecologist was to find out definitively whether the recurrent ureteric stricture the plaintiff was having was due to any active gynaecological condition. At this time the first defendant was already thinking of conducting open surgery on the plaintiff including the same type of surgery that was carried out by PW8. Therefore it is not correct to say that the first defendant has not planned alternative treatment for the plaintiff.
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> [37] It is true that there was a delay in sending the plaintiff to a gynaecologist but the delay was due to the first defendant trying to deal with the ureteric stricture by Holmium laser procedure first in order to avoid open surgery. However, it did not mean the first defendant ruled out entirely the need for open surgery. The first defendant did not have the opportunity to carry out the plan for the open surgery, that is the joint gynaecology and urology operation, because the plaintiff was given an AOR discharge on 3 August 2011. I am therefore of the view that the steps taken by the first defendant in the circumstances is consistent with the normal standard of practice in urology.
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> [38] On the issue of the alleged inadequate taking of the patient's history, *I am in agreement with the learned SFC that it was reasonable for both the first and the third defendants, and also DW2, to expect the plaintiff to be more forthcoming in informing them about her gynaecological*

history and condition since she is a senior pathologist and a colleague. In my opinion, history taking is subjective and very much depends on who the patient is. In any case, the evidence of the first defendant is that he asked the plaintiff general question on her history *and the plaintiff being a medical person and a specialist is expected to provide all the necessary information to the first defendant. I am unable to believe the plaintiff's assertion that the doctors did not take appropriate history from her.*

[39] The first defendant was also criticised by the plaintiff's learned counsel for not taking proper consideration to the letter from PW3 on the finding of 'bilateral multiloculated ovarian cyst'. *The phrase 'ovarian cyst' is general in nature and as rightly explained by the first defendant, it does not mean there is an existence of endometriosis. The letter from PW3 did not mention endometriosis at all.* It was suggested to the first defendant that he should have contacted PW3 to inquire further about the latter's finding. However it has to be noted that both PW3 and the first defendant are specialist in their own field. The first defendant obviously found that PW3's report did not help much and I think it would be quite inappropriate for him to contact and question PW3 on the letter. The first defendant has explained that it is quite inappropriate for him to make inference of something that was not mentioned in a letter from another specialist. (Emphasis added.)

[50] Further, there was agreement among the expert witnesses that previous gynaecological surgeries that the plaintiff had undergone could be the cause of the ureteric strictures. There was therefore no misdiagnosis or wrong treatment administered by the first defendant. In any event there were long periods in between when the first plaintiff had relief from her complaint of left loin pain.

[51] We were of the view, as was demonstrated by the above passages from the judgment, that the learned trial judge had applied her mind to all the issues raised and Her Ladyship had reasoned out her conclusions. We did not find that the learned trial judge was wrong or unreasonable in her findings.

[52] With regard to the allegation that 'fragmented care' or 'failure of systems' as between the two hospitals was another cause for the sufferings of the plaintiff and the delay in proper diagnosis of the plaintiff's condition, the learned trial judge had this to say:

[40] The plaintiff also averred that there was fragmented care in the treatment and management of her gynaecological and urological condition. I am of the view that fragmented care in this case is something unavoidable given the fact that Serdang Hospital did not have a urology department. *The pertinent question here is not so much about fragmented care but rather whether or not the plaintiff has received the appropriate and proper care and management of her medical condition at both hospitals.* In my opinion, based on the evidence, despite the existence of so call fragmented

> care, the plaintiff has nevertheless received the appropriate and available treatment at both hospitals. (Emphasis added.)

[53] We did not find any error on the part of the learned trial judge in so holding. The primary issue was whether the plaintiff received reasonable medical care and attention at Serdang Hospital at the hands of the third defendant on her reported gynaecological symptoms and at Selayang Hospital at the hands of the first defendant for what was reported to be acute left loin pain, detected then to be caused by ureteric stricture.

[54] In our assessment any delay in a fuller diagnosis as claimed by the plaintiff was wholly attributable to the plaintiff's own failure to timely and comprehensively apprise the first defendant that the loin pain suffered by her coincided with her menstrual cycle and further that she had sought treatment at Serdang Hospital for dysmenorrhea with a preliminary diagnosis reached there of suspicion as to endometriosis. The plaintiff herself was the cause of the predicament she had found herself in and not the lack of any communication between the specialists who had treated her at two different government hospitals, as alleged.

[55] Finally as regards the treatment of the testimonies of the respective expert witnesses, there was no indication that the learned trial judge had not critically considered them or that Her Ladyship wholly only accepted the opinion expressed by DW4 and DW6 for the defendants. To the contrary, as can be seen, the learned trial judge had even rejected, with reasons provided, the view put forward by DW6 for the defendants that there were two different strictures that arose over time rather than the same recurring stricture in the treatment underwent by the plaintiff (see paras 41–43 of the judgment). It was not as if the learned trial judge had accepted all of the defendants' expert witnesses' testimony — 'hook, line and sinker', as they say.

[56] The learned trial judge went on then to state at para 44 of the judgement as follows:

> [44] On the point raised by the learned counsel for the plaintiff regarding the independence of the defendants' expert witnesses, namely DW4 and DW6, suffice it to say that there is no reason to doubt their independence merely because they are government consultants and that they knew the first and third defendants. As it is with any expert witnesses, this court will take their opinion pure as a guide and I have given the necessary weight to the evidence based on the circumstances of the case.

We found that the approach taken by the learned judge was correct and could not be faulted in the circumstances.

[57] For the reasons discussed and elaborated above and always having in the forefront of our minds the well laid out principles surrounding the scope of appellate intervention (particularly in respect of a trial with witnesses), we found that the learned trial judge had not misdirected herself on the evidence and was not plainly wrong in dismissing the plaintiff's action. We accordingly dismissed the appeal before us with cost of RM20,000. Deposit was refunded.

Appeal dismissed with costs of RM20,000.

Reported by Kohila Nesan